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SUPREME COURT OF THE UNITED STATES

744458
Supr. Ct

OCTOBER TERM, 1945

No. [redacted] 95

AIRCRAFT & DIESEL EQUIPMENT CORPORATION,
Appellant,

vs.

MAURICE HIRSCH, E. D. McDOUGAL, JOHN R. PAUL, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

STATEMENT AS TO JURISDICTION

ARTHUR R. HALL,
Counsel for Appellant.

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IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Civil Action No. 28999

AIRCRAFT & DIESEL EQUIPMENT CORPORATION,
A CORPORATION,

Plaintiff,

vs.

MAURICE HIRSCH, ET AL.,

Defendants

JURISDICTIONAL STATEMENT UNDER RULE 12 OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES.

The basis upon which it is respectfully contended that there is jurisdiction on appeal in the Supreme Court of the United States to review the order of this Court entered on the 5th day of March, 1946, denying the motions of the plaintiff for an interlocutory injunction and for a declaratory judgment, and dismissing the Amended and Supplemental Complaint, and granting summary judgment in favor of the defendants, is as follows:

I

The Statutory Provision Believed to Sustain the Jurisdiction

The statute believed to sustain the jurisdiction of the Court is the Act of Congress of August 24, 1937, 50 Stat. 751, Section 3 (28 U. S. C. A. 380(a)).

Jurisdiction was so recognized by this Court in *Mine Safety Appliances Company* v. *Forrestal*, — U. S. —, No. 71, October Term, 1945, decided December 10, 1945, 14 L. W. 4048; *Coffman* v. *Breeze Corporation*, 323 U. S. 316; *Oklahoma* v. *Guy F. Atkinson Co.*, 313 U. S. 508.

II

Statutes of the United States Involved in This Proceeding

The statutes of the United States, the validity of which are involved, are as follows:

(1) Section 403 of the Sixth Supplemental National Defense Appropriation Act of 1942 (Public Law 528, 77th Congress, Chapter 247, 56 Stat. 226, 245), approved April 28, 1942, as amended by

(2) Section 801 of the Revenue Act of 1942 (Public Law 753, 77th Congress, Chapter 619, 56 Stat. 798, 982), as further amended by

(3) Section 1 of the Military Appropriations Act of 1944 (Public Law 108, 78th Congress, Chapter 158, 57 Stat. 347, 348), approved July 1, 1943, as further amended by

(4) Public Law 149, 78th Congress, approved July 14, 1943, Chapter 239, 57 Stat. 564; U. S. C. 1940 Ed. Supp. III Appendix 1191; said above mentioned statutes being referred to herein as the "First Act" or the "First Renegotiation Act", and

(5) Section 701 of the Revenue Act of 1943 (Public Law 235, 78th Congress) effective February 25, 1944, 58 Stat. 78, 92, 50 U. S. C. A. Appendix 1191 (herein referred to as the "Renegotiation Act" or the "Second Act").

The Renegotiation Act (February 25, 1944) is now printed in 50 U. S. C. A. Appendix 1191, without the First Act.

Both of the Acts purport to provide a means by which the United States of America may recover from contractors and subcontractors, "excessive profits" alleged to have been realized by such contractors or subcontractors upon sales made to departments or agencies of the United States therein named. Under Section 403 (a) (4) of the First Act, "excessive profits" are "any amount of a contract or subcontract price which is found as a result of renegotiation to represent excessive profits." This Act contained no standards or guides for the determination of alleged excessive profits, except the ultimate determination of the "Secretary" as defined in the Act. The Act purports to vest in such Secretary the power of making such determination if no agreement with the contractor was reached. No review of the determination made by the Secretary was provided by the "First Act."

Under the Renegotiation Act (the "Second Act" effective, if valid, February 25, 1944), "excessive profits" are that part of the profits derived from contracts with the Departments and subcontracts which are determined in accordance with Section 403 (a) (4) (A) to be excessive. This section provides that in determining excessive profits there shall be taken into consideration seven factors, therein named. Section 403 (e) (1) of the "Second Act" provides for a review by the Board of any determination made by the Board's delegate, and for a redetermination of "excessive profits" by The Tax Court of the United States; and Section 403 (e) (2) provides for a redetermination of prior determination made by the Secretaries (under the First Act) upon compliance with the requirements therein set forth. Section 403 (e) (1) provides that the filing of the petition in the Tax Court of the United States shall not operate to stay the execution of the order of the War Contracts Price Adjustment Board, and purports to vest in The

Tax Court of the United States final and exclusive jurisdiction.

The "First Act" being Section 403 of the Sixth Supplemental National Defense Appropriations Act of 1942, as amended, which in terms pertains to plaintiff's profits for the year ended November 30, 1942, and the "Second Act" being Section 701 (b) of the Revenue Act of 1943, commonly called the Renegotiation Act, which in terms pertains to plaintiff's profits for the year ended November 30, 1943, are and each is copied verbatim herein as Appendix "A" and "B", respectively.

III

Date of Decree and Application for Appeal

The date of the decree and judgment order, denying plaintiff's motions for an interlocutory injunction and for a declaratory judgment, dismissing the case and entering summary judgment for defendants on defendants' motion, is March 5, 1946. The date upon which the application for appeal herein was presented is March 29, 1946.

IV

Nature of the Case

The Amended and Supplemental Complaint was filed to restrain the War Contracts Price Adjustment Board, the Secretary of War, and the Under Secretary of War from issuing an order under the Second Act (the Renegotiation Act), requiring customers of plaintiff (not the United States of America or any agency or department thereof) to pay in to the Treasury of the United States, money owed to the plaintiff by such customers, in amounts which the defendants constituting the War Contracts Price Adjustment Board had determined to be "excessive profits" pursuant to the provisions of the Second Act.

The issues raised by the Amended and Supplemental Complaint, and by the motion of the plaintiff for an interlocutory injunction, were the constitutionality of the Renegotiation Act (February 25, 1944) and of Section 403 of the Sixth Supplemental National Defense Appropriations Act (April 28, 1942), as amended.

Plaintiff alleged that the Second Act and the First Act were and each was unconstitutional, being violative of Article I, Section 1; Article III, Sections 1 and 2 of the Constitution of the United States, and of the Fifth, Seventh and Tenth Amendments thereto.

The constitutionality of the First Act is called into question because if it be true that the First Act is unconstitutional, the Government has already collected $204,000 of plaintiff's money to which it was not entitled, and unless restrained will collect an additional $275,000.

Considering, for the purpose only of this contention, that the Second Act be constitutional, the administrative officers of the Government should not be permitted to collect $275,000, but only $275,000 less the $204,000 already illegally collected under the First Act. The Government would then have collected $275,000 determined to be due under the Second Act, i. e., $204,000 illegally collected under the First Act and $71,000 under the Second Act, or a total of $275,000 determined to be due under the Second Act.

We believe that a court of equity under its broad equity powers and under the prayer for general relief, has the power and should exercise the power to enjoin its administrative officers from collecting more money than is in any event due to the Government.

In addition to the allegations as to the constitutionality of the Acts, plaintiff alleged that even if the Acts were constitutional, the defendants had exceeded their statutory authority and were acting illegally, and that no order

should be directed to plaintiff's customers by the Secretary of War until The Tax Court of the United States had acted upon plaintiff's petitions for redetermination of alleged excessive profits for the fiscal years 1942 and 1943, which petitions were then and now are pending in The Tax Court of the United States.

The complaint alleged, and the affidavits filed by the defendants admitted, that unless the Court entered the injunctive order as prayed, restraining the Secretary of War, he would do as he had done in the previous year, namely, direct customers of the plaintiff (who were not the United States of America or any agency or department thereof) to pay into the Treasury of the United States the amount of the determination of excessive profits by the War Contracts Price Adjustment Board (less applicable tax adjustments) before a redetermination had been made in The Tax Court of the United States. This action will follow a denial of the injunction notwithstanding that plaintiff's petitions for redetermination of profits for the years 1942 and 1943 are now pending in The Tax Court of the United States.

The complaint alleged, and the motion to dismiss admitted, that plaintiff was in the business of manufacturing Diesel fuel injection equipment, and precision parts for aircraft, upon customers' specifications, and that plaintiff sold the articles so manufactured by it to various contractors and subcontractors who in turn furnished aircraft or completed engines to the War Department. It was then alleged that the Secretary of War, acting through his delegate the Under Secretary of War, had made a "unilateral determination" on October 27, 1943, that plaintiff had realized excessive profits of $775,000 on its total business of $2,706,477.33 during the fiscal year ended November 30, 1942; that plaintiff had declined to acquiesce in such determination and on May 18, 1944 had filed the Petition

for Redetermination of Profits in The Tax Court of the United States; that in July, 1944, notwithstanding said petition was then, as it is now, still pending in The Tax Court of the United States, the Under Secretary of War directed customers of the plaintiff (not the United States of America or any agency or department thereof), to pay into the Treasury of the United States the sum of $204,000 (that sum representing $775,000 of excessive profits less appropriate tax adjustments), and that such sum of $204,000 was paid into the Treasury of the United States by such customers pursuant to said order.

The complaint also alleged that of the total business of $2,706,477.33 for the fiscal year 1942 (December 1, 1941 to November 30, 1942), eighty per cent (80%) thereof was done on contracts made *prior* to April 28, 1942 (the date of the First Act); that if the writings between plaintiff and its customers did not constitute "master" or over-all contracts, plaintiff had shipped pursuant to "shipping orders" issued prior to April 28, 1942, $1,625,023.65 of the total year's business. The complaint alleged that notwithstanding this fact and other facts bearing upon the unreasonableness of the amount of the determination, the "unilateral determination" had been made and the amount of $204,000 collected from plaintiff's customers while plaintiff's petition for redetermination was pending in The Tax Court of the United States.

The complaint then alleged that following the completion of its fiscal year 1943 (November 30, 1943), plaintiff filed its report with the War Contracts Price Adjustment Board at Chicago, Illinois (asserting the invalidity of the Renegotiation Act), but showing sales of $3,548,845.50, profit *before* Federal taxes of $1,393,470.36, the payment of $991,340.37 of taxes, and a net profit of $402,129.99, or 11.33% of its sales; that on January 11, 1945, the Under Secretary

of War made another unilateral determination, as delegate of the War Contracts Price Adjustment Board, designated an "Order under Delegated Authority," that plaintiff had realized excessive profits of $1,265,000 and directing the elimination of this sum, after tax adjustments. The complaint alleged that plaintiff again filed its Petition for Redetermination in The Tax Court of the United States, where it is still pending. The complaint also alleged that of the total sales of $3,548,845.50 eighty per cent (80%) was shipped pursuant to contracts made before April 28, 1942; that all of said shipments were made before February 25, 1944 (the date of the Second Act), and that in any event $175,423.71 of the total sales were made upon shipping orders issued prior to April 28, 1942.

The complaint also alleged that unless the interlocutory injunction were issued the defendants would direct payment by the customers, as in prior years, to the Treasury of the United States, and plaintiff would sustain irreparable injury in that plaintiff would be compelled to unnecessarily run the risk of subsequently impaired credit or insolvency of its customers; would sustain a great impairment of its working capital; would be required to sue its several customers and incur their ill-will or to refuse to do further work for them. The complaint alleged further that there was no plain, adequate and complete remedy at law because (a) the legal effect of the threatened order was to take plaintiff's property without just compensation and without due process of law; (b) the remedy in The Tax Court of the United States was inadequate because, pending a determination of the questions in The Tax Court of the United States (assuming The Tax Court of the United States can pass upon the constitutionality of the Act), plaintiff's property would be taken as it had been in the prior year; (c) that a remedy, if any, in the Court of Claims is uncertain

and indefinite; (d) that the plaintiff would be required, at great expense, to bring a number of suits at law in different jurisdiction to compel its customers to pay the money owed to it by such customers and that such multiplicity of suits would be onerous to its customers in compelling them to defend suits which involved questions of law of public importance; (e) that plaintiff's officers would be required to be absent from its plant for long periods of time; and (f) that plaintiff would be required in such suits to establish which contracts were found to be productive of excessive profits since the War Contracts Price Adjustment Board had determined excessive profits on a lump sum basis rather than upon individual contracts.

This case was heard below by a Three-Judge Court constituted under the Act of August 24, 1937, 50 Stat. 751, Section 3, 28 U. S. C. A. 380(a).

The order entered March 5, 1946, denies the motion of the plaintiff for an interlocutory injunction, dismisses the complaint and enters a summary judgment for the defendants.

V.

Rulings of the Court Below Which Were Such as to Bring the Case Within the Jurisdictional Provisions Relied upon.

By the complaint and by the motion of the plaintiff, plaintiff sought an interlocutory and permanent injunction, suspending and restraining the enforcement, operation and execution of the Renegotiation Act; and particularly parts of said Act, upon the ground that such Act and particularly Sections 403 (c) (2) and 403 (e) (1) are repugnant to Article I, Section 1; Article III, Sections 1 and 2 of the Constitution of the United States, and to the Fifth, Seventh and Tenth Amendments thereto.

The plaintiff also sought a declaratory judgment that the Act was unconstitutional.

The defendants filed a motion to dismiss the complaint, and for summary judgment in favor of the defendants.

The order of the Court entered March 5, 1946, denied the motion for an interlocutory injunction and for a declaratory judgment and dismissed the complaint, and entered a summary judgment in favor of the defendants. The provisions of the statute, Title 28, Section 380(a), U. S. C. A., under which the Court acted, provide as follows:

> "An appeal may be taken directly to the Supreme Court of the United States upon application therefor or notice thereof within thirty days after the entry of the order, decree, or judgment granting or denying, after notice and hearing, an interlocutory or permanent injunction in such case."

The jurisdiction of the Court was recognized in the case of *Mines Appliance Company* v. *Forrestal*, — U. S. —, No. 71, October Term, 1945, in respect of the First Act questioned here.

Jurisdiction was also recognized based upon similar rulings of the Court in the case of *Coffman* v. *Breeze*, 328 U. S. 316, which relates to a similar proceeding in respect of a very similar Act, the Royalty Adjustment Act.

VI

Grounds upon Which It Is Contended That the Questions Involved Are Substantial

As construed, both Acts authorize an administrative agency to determine the amount of money due to the United States from a citizen, upon whatever information the agency chooses to act, whether that information be known or un-

known to the citizen, and to then collect the amount so determined, by taking the citizen's property without any form of a judicial proceeding, and after such taking of the property, grant a right to a redetermination by a second administrative agency to the complete exclusion of a hearing in a constitutionally organized court.

In our opinion, such statutes violate the provisions of the Constitution of the United States and particularly Article I, Section 1; Article III, Sections 1 and 2; Amendments V, VII and X.

(A)

IT IS BELIEVED THAT THE STATUTES PURPORTED TO DELEGATE LEGISLATIVE FUNCTIONS TO APPOINTED EXECUTIVES AND ADMINISTRATIVE OFFICIALS WITHOUT ANY SUFFICIENT STANDARDS TO GUIDE THEM, AND IN SO DOING VIOLATE THE PROVISIONS OF ARTICLE I, SECTION 1, OF THE CONSTITUTION OF THE UNITED STATES, WHICH PROVIDES THAT ALL LEGISLATIVE POWERS SHALL BE VESTED IN A CONGRESS OF THE UNITED STATES.

The First Act contained no standards or guides for the determination of the amount of excessive profits. Excessive profits was there, Section 403 (A) (4), defined as:

> "The term 'excessive profits' means any amount of a contract or subcontract price which is found as a result of renegotiation to represent excessive profits."

Under this Act, the authority of the Secretary (where no agreement was reached) was unlimited, and as shown by his order of October 27, 1943, in determining the amount of alleged excessive profits for the year 1942, he considered "certain financial, operating and other data submitted by the contractor or obtained by the Under Secretary of War from governmental or other reliable sources relative to the profits realized by the contractor."

In our opinion, the absence of *any* standards or requirements in the Act for the guidance of the agency, rendered the Act void under the decisions of this Court.

Schechter v. *United States*, 295 U. S. 495;
Yakus v. *United States*, 321 U. S. 415;
Panama Ref. Co. v. *Ryan*, 293 U. S. 388;
Carter v. *Carter Coal Co.*, 298 U. S. 238;
United States v. *Cohen*, 255 U. S. 81.

The Second Act defined the term "excessive profits" as follows (Section 403(a)(4)(A)):

> "(4)(A) The term 'excessive profits' means the portion of the profits derived from contracts with the Departments and subcontracts which is determined in accordance with this section to be excessive. In determining excessive profits there shall be taken into consideration the following factors:
>
> "(i) efficiency of contractor, with particular regard to attainment of quantity and quality production, reduction of costs and economy in the use of materials, facilities, and manpower;
>
> "(ii) reasonableness of costs and profits, with particular regard to volume of production, normal pre-war earnings, and comparison of war and peacetime products;
>
> "(iii) amount and source of public and private capital employed and net worth;
>
> "(iv) extent of risk assumed, including the risk incident to reasonable pricing policies;
>
> "(v) nature and extent of contribution to the war effort, including inventive and developmental contribution and cooperation with the Government and other contractors in supplying technical assistance;
>
> "(vi) character of business, including complexity of manufacturing technique, character and extent of subcontracting, and rate of turn-over;

"(vii) such other factors the consideration of which the public interest and fair and equitable dealing may require, which factors shall be published in the regulations of the Board from time to time as adopted."

As shown by the order of the Under Secretary of War, dated January 11, 1945, determining excessive profits for the year 1943 (which order became the order of the War Contracts Price Adjustment Board), these factors also permitted the Secretary to consider, and he did so consider, "certain financial, operating, and other data obtained from governmental or other reliable sources."

In our opinion, the "factors" recited in the Second Act are so vague and indefinite that the Act is void, under the decisions of this Court, cited above.

(B)

IT IS BELIEVED THAT THE STATUTES PURPORT TO DELEGATE JUDICIAL FUNCTIONS TO ADMINISTRATIVE OFFICIALS, AND IN SO DOING VIOLATE THE PROVISIONS OF ARTICLE III, SECTIONS 1 AND 2, OF THE CONSTITUTION OF THE UNITED STATES

Sections 1 and 2 of Article III of the Constitution provide as follows:

"The Judicial power of the United States shall be vested in one supreme court and in such inferior courts as Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts shall hold their offices during good behavior, and shall at stated times receive for their services a compensation which will not be diminished during their continuance in office.

"Section 2. The judicial power shall extend to all cases in law and equity arising under this constitution, and the laws of the United States and treaties made or which shall be made under public authority, to all cases affecting ambassadors, other public ministers and consuls, to all cases in admiralty and maritime

jurisdiction, *to controversies to which the United States shall be a party.*" (Italics ours.)

The First Act contains *no* provision whatsoever for a review of the determination of excessive profits as made by the Secretary or his delegates.

The Second Act purports to grant a redetermination of the determination made by the War Contracts Price Adjustment Board, in The Tax Court of the United States, and then provides that such determination of The Tax Court "shall be final and conclusive and shall not be subject to review or redetermination by any other court or agency." (Section 403(c)(1.)

The Tax Court of the United States, however, is not a court but an agency of the Executive Branch of the Government. (Section 1100, Chapter 5, Title 26, U. S. C. A. 1944 Pamphlet, p. 112, and *Hutching-Bealy National Bank* v. *Com. of Int. Revenue*, 141 Fed. (2d) 422.)

In our opinion the attempt to vest judicial functions in a non-judicial body over "controversies to which the United States shall be a party", renders the Second Act void, and the absence of any judicial review in the First Act renders the First Act void.

Murray's Lessee v. *Hoboken Land*, 18 How. 272;
Gordon v. *United States*, 117 U. S. 697;
Sinking Fund Cases, 99 U. S. 700;
United States v. *Lee*, 106 U. S. 196.

(C)

IT IS BELIEVED THAT BOTH ACTS PURPORT TO DEPRIVE A PERSON OF PROPERTY WITHOUT DUE PROCESS OF LAW.

The Fifth Amendment to the Constitution provides in part as follows:

"No person shall be deprived of life, liberty or property without due process of law."

The First Act provide for no review whatsoever, and only that the contractor may be given notice for an initial conference. If no agreement was reached between the contractor and the Secretary, the Secretary's subsequent determination was final.

The Second Act provides that if no agreement be reached, the War Contracts Price Adjustment Board shall enter an order determining the amount, and if no petition be filed in The Tax Court of the United States such order shall be final and conclusive. (Section 403(c).) If, however, a petition for redetermination is filed in The Tax Court of the United States "it shall not operate to stay the execution of the Board." (Section 403(e).) As plaintiff has experienced, the filing of a petition for redetermination in The Tax Court of the United States does not prevent the taking of its property. Under the Second Act the plaintiff has only the sterile right to file a petition in The Tax Court of the United States and watch its property be taken.

In our opinion, neither the Second Act nor the First Act afford due process of law under the decisions of this Court, or under the accepted American doctrine that "due process" while varying in its requirements, always embodies that procedure commonly described as "fair play".

Porter v. *Investors Syndicate,* 286 U. S. 461;
Pacific Tel. Co. v. *Kuykendall,* 265 U. S. 196;
Morgan v. *United States,* 298 U. S. 468;
Morgan v. *United States,* 304 U. S. 15;
Railroad Com. v. *Pac. Gas & Electric Co.,* 302 U. S. 388.

In each instance the order of the Secretary or of the War Contracts Price Adjustment Board was entered "upon data furnished by the contractor" or "obtained from governmental or other reliable sources", but such last mentioned data was not known to the contractor.

In our opinion, such procedure was in itself a denial of due process under the ruling of this Court made upon an order containing a similar recital.

Ohio Bell Tel. Co. v. *Public Utilities Com.*, 301 U. S. 292, page 296.

(D)

IT IS BELIEVED THAT BOTH ACTS PURPORT TO TAKE PRIVATE PROPERTY FOR PUBLIC USE, WITHOUT JUST COMPENSATION, IN VIOLATION OF THE FIFTH AMENDMENT.

That plaintiff's property, $204,000, was taken under the First Act, as excessive profits for the year 1942, and is now in the Treasury of the United States, is not denied. That there is to be no return of that sum, unless this Court shall so direct, is also undenied.

That defendants propose to take $275,000 more, as excessive profits for the year 1943, is not denied; in fact, it is asserted by the affidavits filed. That such sum will not be returned, unless this Court shall so direct, is also admitted.

The existence of war or emergency vested in Congress no power to violate the provisions of the Constitution.

Schechter v. *United States*, 295 U. S. 495-528;
United States v. *Cohen*, 255 U. S. 81-88.

The taking of plaintiff's property and the proposed taking, under the circumstances herein set forth, is, in our opinion, in direct contradiction to the decisions of this Court.

International Paper Co. v. *United States*, 282 U. S. 399;
Brooks Scanlon Corp. v. *United States*, 265 U. S. 106;
Lynch v. *United States*, 292 U. S. 571.

Even if the right to take property for public use be recognized, the ascertainment of just compensation has always been recognized as a judicial function.

United States v. *New River Collieries*, 262 U. S. 341;
Davis v. *Newton Coal Co.*, 267 U. S. 292.

The Renegotiation Act, while not purporting to authorize the taking of plaintiff's plant, its inventory, its machines or tools, does just as completely authorize the taking of plaintiff's property, that is, the money due it from its customers, for materials sold to such customers. The Act purports to deny to the plaintiff a right to have any judicial determination of the validity of such taking or of the value of the thing taken, and in so doing is repugnant to the Constitution of the United States. (*Waugh* v. *Standard Chemicals*, 221 N. Y. 51, 131 N. E. 566.)

(E)

IT IS BELIEVED THAT BOTH ACTS ARE IN VIOLATION OF ARTICLE VII OF THE CONSTITUTION OF THE UNITED STATES.

Article VII provides that in suits at common law, when the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved.

These Acts purport to allow an administrative agency to assert a claim for money in excess of $20.00 against a citizen, which claim is not one for taxes, determine that claim in the agency's own manner, and to then deny to the citizen his right to a trial by a jury.

In our opinion the right to a trial by jury is still one of the safeguards of the individual and cannot be legislated away.

Galloway v. *United States*, 319 U. S. 372, and cases there cited;
Van Horn's Lessee v. *Dorrance*, 2 Dall, 303.

(F)

IT IS BELIEVED THAT IN ITS RETROACTIVE PROVISIONS, AND THE DEFENDANTS' ACTION THERETO, THE STATUTES ARE UNCONSTITUTIONAL UNDER THE RULINGS OF THE COURT IN CHICAGO & NORTHWESTERN RY. CO. v. UNITED STATES, 104 U. S. 680; LYNCH v. UNITED STATES, 292 U. S. 571; UNITED STATES v. BETHLEHEM SHIPBUILDING CORPORATION, 315 U. S. 289.

(a) The Second Act was enacted February 25, 1944. It purports by its terms (Section 403 (C) (6)) "to apply to all contracts and subcontracts to the extent of amounts received or accrued thereunder in any fiscal year ending after June 30, 1943, whether such contracts or subcontracts were made on, prior to, or after the date of the enactment of the Revenue Act of 1943." Plaintiff's fiscal year ended November 30, 1943. All sales for that year were completed two months before the Revenue Act of 1943 was enacted.

(b) The First Act was enacted April 28, 1942. It purports by its terms (Section 403 (d) (6)) to apply "to all contracts and subcontracts hereafter made, and to all contracts and subcontracts heretofore made, whether or not such contracts or subcontracts contain a renegotiation or recapture clause unless final payment pursuant to such contracts or subcontracts was made prior to April 28, 1942."

In the Amended Complaint, plaintiff asserted that of the total sales in 1943 of $3,548,845.50 ($3,519,825 deemed subject to renegotiation), a total of $2,780,000.82 were upon contracts made *prior* to April 28, 1942 with six customers. Plaintiff further asserted that of its total sales in 1942 of $2,706,477.33 ($2,448,000 deemed subject to renegotiation), a total of $1,886,770.11 was made upon contracts made *prior* to April 28, 1942.

In the determinations of the agencies for the fiscal years 1942 and 1943, those sales upon contracts made prior to April 28, 1942 were *included* as being subject to renegotiation, regardless of the date of the contract.

In the District Court defendants asserted in their briefs that plaintiff did not have master contracts, but rather individual contracts in the form of purchase orders. For the year 1943, as alleged in the complaint, $175,423.71 of sales were made upon purchase orders prior to April 28, 1942, and for the year 1942, $1,625,023.65 of sales were made upon the so-called "short term contracts or purchase orders made prior to April 28, 1942."

In both years, 1942 and 1943, the agencies included such sales made upon purchase orders prior to April 28, 1942.

It is believed that whether plaintiff had master or over-all contracts dated prior to April 28, 1942, or individual contracts predicated upon shipping orders dated prior to April 28, 1942 (which question some court should ultimately pass upon), there can be no question but that the *inclusion* of such sales, on contracts or on orders made prior to April 28, 1942, was improper and that the statute purporting to give such right (if it be subject to such construction) was unconstitutional.

It is respectfully submitted that the questions here involved are most substantial and of the greatest importance. The legislation is new and unusual. It deprives the citizen of his property without any form of judicial sanction. It places the individual at the complete mercy of an individual governmental agency. It requires and affords no uniformity of action. It is not a taxing statute, and yet purports to authorize collection of the amount determined to be excessive in a manner not sanctioned by a tax statute. It deprives the citizen of a trial by a jury in a suit between his government and himself. It is the means of the destruction of a business without any redress if an error had been made. It justifies the repudiation by the government of its contracts, and grants to an administrative agency the power to rewrite private contracts.

These are substantial questions of grave public importance and it is respectfully suggested that the importance of this legislation deserves and should receive the early consideration of the Supreme Court of the United States.

VII

The Opinion of the Court upon the Decree Sought to Be Reviewed

There is attached hereto, marked Exhibit "C", a copy of the opinion delivered upon the rendering of the decree sought to be reviewed. There are no earlier opinions in this case.

VIII

The Court Erred in the Entry of Its Order of March 5, 1946, Denying the Interlocutory Injunction and Dismissing the Complaint.

The order of the Court entered March 5, 1946, denied the motions of the plaintiff for an interlocutory injunction and for a declaratory judgment. In addition, the same order dismissed the complaint and entered summary judgment for the defendants.

During July, 1944, the Under Secretary of War directed customers of the plaintiff to pay into the Treasury of the United States the sum of $204,000, representing the determination of the Under Secretary as to the amount of excessive profits (after tax adjustments) realized by the contractor during the year ended November 30, 1942, and the amount of $204,000 was so paid pursuant to said order. The action of the Under Secretary was taken after plaintiff's Petition for Redetermination of Profits for 1942 was filed in The Tax Court of the United States.

After the "Order under Delegated Authority", determining excessive profits for the year 1943, dated January 11, 1945, was received, plaintiff filed its Petition for Redetermination of Profits in The Tax Court of the United States for the year 1943. Both the 1942 and the 1943 petitions are still pending in The Tax Court. Both petitions assert the invalidity of the Act under which the respective determinations were made, and both petitions assert that even if the Acts under which the respective determinations were made are valid, such Acts have been improperly applied to plaintiff's operations.

After receiving the order of January 11, 1945, plaintiff anticipated that the defendants would do, as they had done in the prior year, namely, direct customers to pay approximately $275,000 into the Treasury of the United States, before there was any judicial determination of the validity of the Act, and before The Tax Court of the United States would pass upon the Petition for Redetermination of Profits for 1943. That the defendants proposed to take this action is admitted by the defendants in their affidavits.

It is respectfully contended that in view of the situation existing, the Court was in error in the entry of its order of March 5, 1946, for the following reasons:

(a) Substantial doubt exists as to the validity of both of the Acts, and neither has as yet been approved by the Supreme Court of the United States as a valid exercise of the powers of the Federal Government. If both Acts are determined to be invalid, then the action taken for the year 1942, and the action proposed to be taken for the year 1943, is in each instance illegal. If the First Act only is invalid, plaintiff has already been deprived of $204,000 which might well be set off against any subsequent accruing claim under the Second Act. The District Court did not pass upon the constitutionality of either Act, but placed its decision upon

the ground that the suit was premature and that plaintiff had adequate remedies at law. Until both Acts have been determined to be valid, action as drastic as is proposed to be taken should, in our opinion, have been enjoined in order that the questions might be passed upon by the Court without inflicting unnecessary hardship upon the plaintiff. It was so held by a District Court in the case of *Lincoln Electric Co.* v. *Knox,* 56 Fed. Supp. 308.

(b) The issuance of an interlocutory injunction would not have injured the defendants or the United States of America, since adequate bond for the payment of any amount alleged to be due would have been required, whereas the denial of the injunction permits plaintiff to be deprived of $275,000 of needed working capital, in addition to the $204,000 already taken, without means of recovery for the injury it must sustain if the taking be found to be illegal in whole or in part. If the doctrine of the balancing of conveniences discussed in *Petroleum Co.* v. *Com.*, 304 U .S. 209, is operative, the case of the plaintiff is so strong that a denial of the issuance of an injunction must be an abuse of discretion, and the dismissing of the complaint be error.

(c) The District Court erroneously assumed that the suit was premature.

I

The Suggested Remedy in the Tax Court

In the opinion reference is made to the fact that plaintiff has filed its petition in The Tax Court of the United States, and to the possibility that The Tax Court of the United States may find that plaintiff realized no excessive profits.

It is then asserted that if The Tax Court of the United States should so hold, the constitutionality of the Act is immaterial, and for that reason the suit is premature, until

the administrative remedy has been exhausted. In support of this statement, the Court cites *Arrow Distilleries, Inc.*, v. *Alexander*, 24 Fed. Supp. 880, affirmed 306 U. S. 615. We do not believe the decision, or the rule, applicable here.

It is perhaps true that every effort should be made, in most situations, to exhaust the administrative remedy before seeking injunctive relief. This the plaintiff did by the filing of its petitions for redetermination for the years 1942 and 1943 in The Tax Court of the United States. It does not follow, however, that plaintiff has no right to injunctive relief when, while awaiting action of the administrative reviewing agency, the property of the plaintiff will be taken from the plaintiff. *Porter* v. *Investors Syndicate*, 285 U. S. 461. The Supreme Court has held that an injunction may issue notwithstanding no effort has been made to obtain relief through administrative agencies. *United States* v. *Abilene & No. Ry. Co.*, 265 U. S. 274.

If plaintiff be required to await action of The Tax Court of the United States, then the so-called "administrative remedy" is no remedy at all, but rather a deterrent to the procedure ordinarily applicable if the suit were between individuals.

It is extremely doubtful whether The Tax Court of the United States has the jurisdiction to pass upon the constitutionality of the Acts. It is even more doubtful whether, if such jurisdiction exists, it will be exercised by The Tax Court of the United States. It would appear, therefore, that the remedy in The Tax Court is not equal to the one which a Federal equity court could afford.

It is respectfully asserted that where the so-called "administrative remedy" is not adequate to protect the individual or his property, either because it lacks jurisdiction to pass upon the questions presented, or because it cannot act with sufficient speed to protect the individual or his prop-

erty, that a Federal court of equity will not require the administrative remedy to be exhausted before furnishing the means of preventing the threatened injury. This is particularly true when the other party will not sustain an injury by such procedure.

2

The Suggested Remedy in the Court of Claims

It is next asserted "that as to any liability on the United States, its (plaintiff's) remedy is in the Court of Claims." Unlike the Royalty Adjustment Act, which was before the court in *Coffman* v. *Breeze*, 323 U. S. 316, plaintiff has no right in the Court of Claims. A careful reading of the Renegotiation Act fails to disclose any reference to the Court of Claims. Even if it be assumed that as to the payments made into the Treasury, plaintiff has some right of recovery outside the language of the Renegotiation Act, it follows that such remedy is neither "as complete, practical and efficient as that which equity could afford." (*Terrance* v. *Thompson*, 263 U. S. 197.)

Under any circumstances, plaintiff's possible recovery in the Court of Claims is neither as complete, practical or efficient as the equity could afford. Even assuming jurisdiction of the Court of Claims, and assuming the Acts be each declared unconstitutional in a proceeding against a customer, repayment of the amounts collected could not reasonably be expected in three years. This suggested "adequate remedy" can hardly be said to be as "complete, practical and efficient" as could be afforded in an equity court in a single proceeding where all questions are before the Court and could be determined in a single proceeding.

3

The Suggested Remedy by Actions at Law Against the Several Debtors

In the opinion of the Court, it is aserted that "plaintiff's debtors are not numerous", and that "there is no reason why the plaintiff has not a complete and adequate remedy by suit against its customers for any sums that may be due from them if the Act be unconstitutional."

While it is not known what the Court meant by the statement that "plaintiff's debtors are not numerous", it does appear from the affidavits filed that to recover $275,000 plaintiff would be required to sue twenty (20) or more of its customers.

It must be apparent, also, that such suits cannot be as "complete, practical and efficient" as this proceeding. The customers are in different cities and states. Attorneys must be employed in each of those cities where suits are instituted. Plaintiff's officials must be ready to appear in those cities, to the disadvantage of the plaintiff corporation in the conduct of its business. Plaintiff's customers will not regard favorably a suit against them involving a matter in which they are not primarily interested, and in which they are nominal parties only, and these defendants the real parties. Plaintiff will by such procedure lose the good will it has created and maintained. Delays, expense, interference with business, and with customer relations, confusion and uncertainty can only result from the procedure suggested by the District Court. The granting of the interlocutory injunction and a hearing upon the merits would afford a prompt determination of the questions of public interest, between the actual interested parties, in a much less expensive procedure and without unnecessary inter-

ference with plaintiff's business or the duties of its officers. *Harrisonville* v. *Dickey Clay Co.*, 289 U. S. 334; *Pierce* v. *Society of Sisters*, 268 U. S. 510; *Raich* v. *Truax*, 239 U. S. 33; *Columbia System* v. *Federal Communications*, 316 U. S. 407.

In the opinion of the District Court reference is made to *Coffman* v. *Breeze*, 323 U. S. 316, as supporting the contention that the law affords a complete and legal remedy in the present case. We do not so understand that opinion. In that case the plaintiff had only two customers who might be sued; the defendant answered that no royalties were due, and the validity of the Act was therefore immaterial. In addition, the Royalty Adjustment Act gives to the aggrieved party the right to institute suits against the United States, in the Court of Claims or in the District Courts, a provision not appearing in the Renegotiation Act.

In the instant case the complaint (Par. 44) alleged that the denial of the injunction would result in irreparable injury to the plaintiff, in that it would (a) compel plaintiff to unnecessarily run the risk of the subsequently impaired credit or the insolvency of the several debtors; (b) impair plaintiff's working capital; (c) force plaintiff to select one of two courses, continue to ship to customers who withheld payments, with the impairment of plaintiff's capital, or refuse to make shipments and discontinue business; and (d) force plaintiff to sue its customers with the resultant ill feeling and loss of good will.

In the complaint (par. 45), it is further alleged that plaintiff is without a plain and adequate remedy at law, because (a) the ordering of payment is the taking of plaintiff's property without compensation and without providing any legal remedy to recover the same; (b) the right of redetermination of amount in The Tax Court affords no means

of recovery of the amounts paid; (c) the case may not be within the jurisdiction of the Court of Claims, and no recovery of interest could be had; (d) the multiplicity of suits required in various jurisdictions, with the attendant costs and delays; and (e) the loss of good will.

It is most respectfully contended that the suggestion of the District Court that an adequate remedy at law exists, is as unlegalistic as it is unrealistic.

It is further suggested in the opinion that plaintiff should not complain of any defects in the hearings before the War Contracts Price Adjustment Board, since plaintiff is assured of a full hearing before The Tax Court, and in support of that suggestion there is cited *National Labor Relations Board* v. *Mackey Radio Co.*, 304 U. S. 333. In this assertion the District Court has overlooked the fact that in the case cited the defect in administrative procedure did not result in the taking of property without compensation, without due process and without a remedy for its recovery. The District Court also overlooked the fact that the full hearing in The Tax Court of the United States is only a hearing before a second administrative body, a branch of the Executive Department of the Government and not a proper substitute for a constitutional court empowered to determine questions of constitutional law as presented here. The District Court also overlooked the fact that the "full hearing in The Tax Court of the United States" affords nothing except an academic review, since long before its determination is made, plaintiff's property is taken, and no means of recovery are afforded.

It is respectfully asserted that the District Court erred in denying the interlocutory injunction and in dismissing the complaint. It is also respectfully contended that the importance of the legislation involved, the serious doubt

of its validity, the situation as applied to plaintiff justified the issuance of the interlocutory injunction, and a subsequent determination of the issues on the merits.

Respectfully submitted,

GALLAGHER, RINAKER, WILKINSON & HALL,
(S.) ARTHUR R. HALL,
Attorneys for Plaintiff.

EXHIBIT "A"

Renegotiation Act of 1942

(Applicable to Fiscal Years Ending Before July 1, 1943)

RENEGOTIATION ACT OF 1942. Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942 (Public 528, 77th Congress), approved April 28, 1942, as amended by Section 801 of the Revenue Act of 1942 (Public 753, 77th Congress), approved October 21, 1942; by the Military Appropriation Act, 1944 (Public 108, 78th Congress), approved July 1, 1943; and by Public 149, 78th Congress, approved July 14, 1943.

Sec. 403 (a). For the purposes of this section—

(1) The term "Department" means the War Department, the Navy Department, the Treasury Department, the Maritime Commission, Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company, respectively.

(2) In the case of the Maritime Commission, the term "Secretary" means the Chairman of such Commission, and in the case of Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company, the term "Secretary" means the board of directors of the appropriate corporation.

(3) The terms "renegotiate" and "renegotiation" include the refixing by the Secretary of the Department of the contract price.

(4) The term "excessive profits" means any amount of a contract or subcontract price which is found as a result of renegotiation to represent excessive profits.

(5) The term "subcontract" means

(i) any purchase order or agreement to perform all or any part of the work, or to make or furnish any article, required for the performance of any other contract or subcontract, or

(ii) any contract or arrangement (other than a contract or arrangement between two contracting parties, one of which parties is found by the Secretary to be a bona fide executive officer, partner, or full-time employee of the other contracting party),

(A) any amount payable under which is contingent upon the procurement of a contract or contracts with a Department or of a subcontract or subcontracts thereunder, or determined with reference to the amount of such a contract or subcontract or such contracts or subcontracts, or

(B) under which any part of the services performed or to be performed consists of the soliciting, attempting to procure, or procuring a contract or contracts with a Department or a subcontract or subcontracts thereunder:

Provided, That nothing in this sentence shall be construed (1) to affect in any way the validity or construction of provisions in any contract with a Department or any subcontract thereunder heretofore at any time or hereafter made, prohibiting the payment of contingent fees or commissions; or (2) to restrict in any way the authority of the Secretary to determine the nature or amount of selling expenses under subcontracts as defined in (ii) herein, as a proper element of the contract price or as a reimbursable item of cost, under a contract with a Department or a subcontract thereunder. The term "article" includes any material, part, assembly, machinery, equipment, or other personal property.

For the purposes of subsections (d) and (e) of this section, the term "contract" includes a subcontract and the term "contractor" includes a subcontractor.

Sec. 403(b). Subject to subsection (i), the Secretary of each Department is authorized and directed to insert in any contract for an amount in excess of $100,000 hereafter made by such Department—

(1) a provision for the renegotiation of the contract price at a period or periods when, in the judgment of the

Secretary, the profits can be determined with reasonable certainty;

(2) a provision for the retention by the United States from amounts otherwise due the contractor, or for the repayment by him to the United States, if paid to him, of any excessive profits not eliminated through reductions in the contract price, or otherwise, as the Secretary may direct;

(3) a provision requiring the contractor to insert in each subcontract described in subsection (a)(5)(ii) and in each subcontract for an amount in excess of $100,000 described in subsection (a)(5)(i) made by him under such contract

(i) a provision for the renegotiation by such Secretary and the subcontractor of the contract price of the subcontract at a period or periods when, in the judgment of the Secretary, the profits can be determined with reasonable certainty.

(ii) a provision for the retention by the contractor for the United States of the amount of any reduction in the contract price of any subcontract pursuant to its renegotiation hereunder, or for the repayment by the subcontractor to the United States of any excessive profits from such subcontract paid to him and not eliminated through reductions in the contract price or otherwise, as the Secretary may direct, and

(iii) a provision for relieving the contractor from any liability to the subcontractor on account of any amount so retained by the contractor or repaid by the subcontractor to the United States, and

(iv) in the discretion of the Secretary, a provision requiring any subcontractor to insert in any subcontract made by him under such subcontract, provisions corresponding to those of subparagraphs (3) and (4) of this subsection (b); and

(4) a provision for the retention by the United States from amounts otherwise due the contractor, or for repay-

ment by him to the United States, as the Secretary may direct, of the amount of any reduction in the contract price of any subcontract under such contract, which the contractor is directed, pursuant to clause (3) of this subsection, to withhold from payments otherwise due the subcontractor and actually unpaid at the time the contractor receives such direction.

The provision for the renegotiation of the contract price, in the discretion of the Secretary,

(i) may fix the period or periods when or within which renegotiation shall be had; and

(ii) if in the opinion of the Secretary the provisions of the contract or subcontract are otherwise adequate to prevent excessive profits, may provide that renegotiation shall apply only to a portion of the contract or subcontract or shall not apply to performance during a specified period or periods and may also provide that the contract price in effect during any such period or periods shall not be subject to renegotiation.

Section 403(c). (1) Whenever, in the opinion of the Secretary of a Department, the profits realized or likely to be realized from any contract with such Department, or from any subcontract thereunder whether or not made by the contractor, may be excessive, the Secretary is authorized and directed to require the contractor or subcontractor to renegotiate the contract price. When the contractor or subcontractor holds two or more contracts or subcontracts the Secretary, in his discretion, may renegotiate to eliminate excessive profits on some or all of such contracts and subcontracts as a group without separately renegotiating the contract price of each contract or subcontract.

(2) Upon renegotiation, the Secretary is authorized and directed to eliminate any excessive profits under such contract or subcontract

(i) by reductions in the contract price of the contract or subcontract or by other revision in its terms; or

(ii) by withholding, from amounts otherwise due to the contractor or subcontractor, any amount of such excessive profits; or

(iii) by directing a contractor to withhold for the account of the United States, from amounts otherwise due to the subcontractor, any amount of such excessive profits under the subcontract; or

(iv) by recovery from the contractor or subcontractor, through repayment, credit or suit, of any amount of such excessive profits actually paid to him; or

(v) by any combination of these methods, as the Secretary deems desirable. The Secretary may bring actions on behalf of the United States in the appropriate courts of the United States to recover from such contractor or subcontractor, any amount of such excessive profits actually paid to him and not withheld or eliminated by some other method under this subsection. The surety under a contract or subcontract shall not be liable for the repayment of any excessive profits thereon. All money recovered by way of repayment or suit under this subsection shall be covered into the Treasury as miscellaneous receipts.

(3) In determining the excessiveness of profits realized or likely to be realized from any contract or subcontract, the Secretary shall recognize the properly applicable exclusions and deductions of the character which the contractor or subcontractor is allowed under Chapter 1 and Chapter 2E of the Internal Revenue Code. In determining the amount of any excessive profits to be eliminated hereunder the Secretary shall allow the contractor or subcontractor credit for Federal income and excess profits taxes as provided in Section 3806 of the Internal Revenue Code.

(4) Upon renegotiation pursuant to this section, the Secretary may make such final or other agreements with a contractor or subcontractor for the elimination of excessive profits and for the discharge of any liability for excessive profits under this section, as the Secretary deems desirable. Such agreements may cover such past and future period or periods, may apply to such contract or contracts of the contractor or subcontractor, and may contain such terms and conditions, as the Secretary deems advisable. Any such

agreement shall be final and conclusive according to its terms; and except upon a showing of fraud or malfeasance or a wilful misrepresentation of a material fact,

(i) such agreement shall not be reopened as to matters agreed upon, and shall not be modified by any officer, employee, or agent of the United States; and

(ii) such agreement and any determination made in accordance therewith shall not be annulled, modified, set aside, or disregarded in any suit, action, or proceeding.

(5) Any contractor or subcontractor who holds contracts or subcontracts, to which the provisions of this section are applicable, may file with the Secretaries of all the Departments concerned statements of actual costs of production and such other financial statements for any prior fiscal year or years of such contractor or subcontractor, in such form and detail, as the Secretaries shall prescribe by joint regulation. Within one year after the filing of such statements, or within such shorter period as may be prescribed by such joint regulation, the Secretary of a Department may give the contractor or subcontractor written notice, in form and manner to be prescribed in such joint regulation, that the Secretary is of the opinion that the profits realized from some or all of such contracts or subcontracts may be excessive, and fixing a date and place for an initial conference to be held within sixty days thereafter. If such notice is not given and renegotiation commenced by the Secretary within such sixty days the contractor or subcontractor shall not thereafter be required to renegotiate to eliminate excessive profits realized from any such contract or subcontract during such fiscal year or years and any liabilities of the contractor or subcontractor for excessive profits realized during such period shall be thereby discharged.

(6) This subsection (c) shall be applicable to all contracts and subcontracts hereafter made and to all contracts and subcontracts heretofore made, whether or not such

contracts or subcontracts contain a renegotiation or recapture clause, unless

(i) final payment pursuant to such contract or subcontract was made prior to April 28, 1942; or

(ii) the contract or subcontract provides otherwise pursuant to subsection (b) or (i), or is exempted under subsection (i) of this section 403; or

(iii) the aggregate sales by and amounts payable to the contractor or subcontractor and all persons under the control of or controlling or under common control with the contractor or subcontractor, under contracts with the Departments and subcontracts thereunder (including those described in clauses (i) and (ii) of this subsection (6), but excluding subcontracts described in subsection (a) (5) (ii) do not exceed, or in the opinion of the Secretary will not exceed, $100,000, and under subcontracts described in subsection (a) (5) (ii) do not exceed, or in the opinion of the Secretary will not exceed, $25,000, for the fiscal year of such contractor or subcontractor.

No renegotiation of the contract price pursuant to any provision therefor, or otherwise, shall be commenced by the Secretary more than one year after the close of the fiscal year of the contractor or subcontractor within which completion or termination of the contract or subcontract, as determined by the Secretary, occurs.

Sec. 403(d). In renegotiating a contract price or determining excessive profits for the purposes of this section, the Secretaries of the respective Departments shall not make any allowance for any salaries, bonuses, or other compensation paid by a contractor to its officers or employees in excess of a reasonable amount, nor shall they make allowance for any excessive reserves set up by the contractor or for any costs incurred by the contractor which are excessive and unreasonable. For the purpose of ascertaining whether such unreasonable compensation has been or is being paid, or whether such excessive reserves have been

or are being set up, or whether any excessive and unreasonable costs have been or are being incurred, each such Secretary shall have the same powers with respect to any such contractor that an agency designated by the President to exercise the powers conferred by title XIII of the Second War Powers Act, 1942, has with respect to any contractor to whom such title is applicable. In the interest of economy and the avoidance of duplication of inspection and audit, the services of the Bureau of Internal Revenue shall, upon request of each such Secretary and the approval of the Secretary of the Treasury, be made available to the extent determined by the Secretary of the Treasury for the purposes of making examinations and determinations with respect to profits under this section.

Sec. 403(e). In addition to the powers conferred by existing law, the Secretary of each Department shall have the right to demand of any contractor who holds contracts with respect to which the provisions of this section are applicable, statements of actual costs of production and such other financial statements, at such times and in such form and detail, as such Secretary may require. Any person who willfully fails or refuses to furnish any statement required of him under this subsection, or who knowingly furnishes any such statement containing information which is false or misleading in any material respect, shall, upon conviction thereof, be punished by a fine of not more than $10,000 or imprisonment for not more than two years, or both. The Powers conferred by this subsection shall be exercised in the case of any contractor by the Secretary of the Department holding the largest amount of such contracts with such contractor, or by such Secretary as may be mutually agreed to by the Secretaries concerned.

Sec. 403(f). Subject to any regulations which the President may prescribe for the protection of the interests of the Government, the authority and discretion herein conferred upon the Secretary of each department may be delegated in whole or in part by him to such individuals or agencies as he may designate in his Department, or in any other Department with the consent of the Secretary

of that Department, and he may authorize such individuals or agencies to make further delegations of such authority and discretion.

Sec. 403(g). If any provision of this section or the application thereof to any person or circumstance is held invalid, the remainder of the section and the application of such provision to other persons or circumstances shall not be affected thereby.

Sec. 403(h). This section shall remain in force during the continuance of the present war and for three years after the termination of the war, but no court proceedings brought under this section shall abate by reason of the termination of the provisions of this section.

Sec. 403(i). (1) The provisions of this section shall not apply to—

(i) any contract by a Department with any other department, bureau, agency, or governmental corporation of the United States or with any Territory, possession, or State or any agency thereof or with any foreign government or any agency thereof; or

(ii) any contract or subcontract for the product of a mine, oil or gas well, or other mineral or natural deposit, or timber, which has not been processed, refined, or treated beyond the first form or state suitable for industrial use; and the Secretaries are authorized by joint regulation, to define, interpret, and apply this exemption.

(2) The Secretary of a Department is authorized, in his discretion, to exempt from some or all of the provisions of this section—

(i) any contract or subcontract to be performed outside of the territorial limits of the continental United States or in Alaska;

(ii) any contracts or subcontracts under which, in the opinion of the Secretary, the profits can be determined with reasonable certainty when the contract

price is established, such as certain classes of agreements for personal services, for the purchase of real property, perishable goods, or commodities the minimum price for the sale of which has been fixed by a public regulatory body, of leases and license agreements, and of agreements where the period of performance under such contract or subcontract will not be in excess of thirty days; and

(iii) a portion of any contract or subcontract or performance thereunder during a specified period or periods, if in the opinion of the Secretary, the provisions of the contract are otherwise adequate to prevent excessive profits.

The Secretary may so exempt contracts and subcontracts both individually and by general classes or types.

Sec. 403(j). Nothing in sections 109 and 113 of the Criminal Code (U. S. C., title 18, secs. 198 and 203) or in section 190 of the Revised Statutes (U. S. C., title 5, sec. 99) shall be deemed to prevent any person appointed by the Secretary of a Department for intermittent and temporary employment in such Department, from acting as counsel, agent, or attorney for prosecuting any claim against the United States;
Provided, That such person shall not prosecute any claim against the United States

(1) which arises from any matter directly connected with which such person is employed, or

(2) during the period such person is engaged in intermittent and temporary employment in a Department.

Sec. 403(k). All the provisions of this section shall be construed to apply to Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company.

Effective Date of Amendments. Subsection (d) of Section 801 of the Revenue Act of 1942 provides:

"The amendments made by this section shall be effective as of April 28, 1942."

Section 5 of Public Law 149, 78th Congress provides:

"The amendments made by this Act shall be effective as of April 28, 1942."

EXHIBIT "B"

Renegotiation Act of 1943

(Applicable to Fiscal Years Ending After June 30, 1943)

RENEGOTIATION ACT OF 1943. Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942 (Public 528, 77th Congress), approved April 28, 1942, as amended by Section 801 of the Revenue Act of 1942 (Public 753, 77th Congress), approved October 21, 1942; by the Military Appropriation Act, 1944 (Public 108, 78th Congress), approved July 1, 1943; by Public 149, 78th Congress, approved July 14, 1943; and as amended in full by Section 701 (b) of the Revenue Act of 1943 (Public 235, 78th Congress), enacted February 25, 1944.

Sec. 403(a). For the purposes of this section—

(1) The term "Department" means the War Department, the Navy Department, the Treasury Department, the Maritime Commission, the War Shipping Administration, Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company, respectively.

(2) In the case of the Maritime Commission, the term "Secretary" means the Chairman of such Commission, in the case of the War Shipping Administration, the term "Secretary" means the Administrator of such Administration, and in the case of Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company, the term "Secretary" means the board of directors of the appropriate corporation.

(3) The terms "renegotiate" and "renegotiation" include a determination by agreement or order under this section of the amount of any excessive profits.

(4) (A) The term "excessive profits" means the portion of the profits derived from contracts with the Departments and subcontracts which is determined in accordance with this section to be excessive. In determining excessive profits there shall be taken into consideration the following factors:

(i) efficiency of contractor, with particular regard to attainment of quantity and quality production, reduction of costs and economy in the use of materials, facilities, and manpower;

(ii) reasonableness of costs and profits, with particular regard to volume of production, normal pre-war earnings, and comparison of war and peacetime products;

(iii) Amount and source of public and private capital employed and net worth;

(iv) extent of risk assumed, including the risk incident to reasonable pricing policies;

(v) nature and extent of contribution to the war effort, including inventive and developmental contribution and cooperation with the Government and other contractors in supplying technical assistance;

(vi) character of business, including complexity of manufacturing technique, character and extent of subcontracting, and rate of turn-over;

(vii) such other factors the consideration of which the public interest and fair and equitable dealing may require, which factors shall be published in the regulations of the Board from time to time as adopted.

(B) The term "profits derived from contracts with the Departments and subcontracts" means the excess of the amount received or accrued under such contracts and subcontracts over the costs paid or incurred with respect thereto. Such costs shall be determined in accordance with the method of cost accounting regularly employed by the contractor in keeping his books, but if no such method of cost accounting has been employed, or if the method so

employed does not, in the opinion of the Board or, upon redetermination, in the opinion of The Tax Court of the United States properly reflect such costs, such costs shall be determined in accordance with such method as in the opinion of the Board or, upon redetermination, in the opinion of The Tax Court of the United States does properly reflect such costs. Irrespective of the method employed or prescribed for determining such costs, no item of cost shall be charged to any contract with a Department or subcontract or used in any manner for the purpose of determining such cost, to the extent that in the opinion of the Board or, upon redetermination, in the opinion of The Tax Court of the United States, such item is unreasonable or not properly chargeable to such contract or subcontract. Notwithstanding any other provisions of this section, all items estimated to be allowable as deductions and exclusions under Chapters 1 and 2 E of the Internal Revenue Code (excluding taxes measured by income) shall, to the extent allocable to such contracts and subcontracts (or, in the case of the recomputation of the amortization deduction, allocable to contracts with the Departments and subcontracts), be allowed as items of cost, but in determining the amount of excessive profits to be eliminated proper adjustment shall be made on account of the taxes so excluded, other than Federal taxes, which are attributable to the portion of the profits which are not excessive.

(C) Notwithstanding any of the provisions of this section to the contrary, no amount shall be allowed as an item of cost (i) by reason of a recomputation of the amortization deduction pursuant to section 124 (d) of the Internal Revenue Code until after such recomputation has been made in connection with a determination of the taxes imposed by Chapters 1, 2A, 2B, 2D, and 2E of the Internal Revenue Code for the fiscal year to which the excessive profits determined by the renegotiation are attributable or (ii) by reason of the application of a carry-over or carry-back under any circumstances. The absence of such a recomputation of the amortization deductions referred to in clause (i) above shall not constitute a cause for postponing the making of an agreement, or the entry of an order, de-

termining the amount of excessive profits, or for staying the elimination thereof.

(D) Notwithstanding any of the provisions of subsection (c) (4) of this section to the contrary, in the case of a renegotiation which is made prior to such recomputation, there shall be repaid by the United States (without interest) to the contractor or subcontractor after such recomputation the amount of a net renegotiation rebate computed in the following described manner. There shall first be ascertained the portion of the excessive profits determined by the renegotiation which is attributable to the fiscal year with respect to which a net renegotiation rebate is claimed by the contractor or subcontractor (hereinafter referred to as "renegotiated year"). There shall then be ascertained the amount of the gross renegotiation rebate for the renegotiated year, which amount shall be an allocable part of the additional amortization deduction which is allowed for the renegotiated year upon the recomputation made pursuant to section 124 (d) of the Internal Revenue code in connection with the determination of the taxes for such year and which is attributable to contracts with the Departments and subcontracts, except that the amount of the gross renegotiation rebate shall not exceed the amount of excessive profits eliminated for the renegotiated year pursuant to the renegotiation. The allocation of the additional amortization deduction attributable to contracts with the Departments and subcontracts, and the allocation of the additional amortization deduction to the renegotiated year shall be determined in accordance with regulations prescribed by the Board. There shall then be ascertained the amount of the contractor's or subcontractor's Federal tax benefit from the renegotiation for the renegotiated year. Such Federal tax benefit shall be the amount by which the taxes for the renegotiated year under Chapters 1, 2A, 2B, 2D, and 2E of the Internal Revenue Code were decreased by reason of omitting from gross income (or by reason of the application of the provisions of section 3806(a) of the Internal Revenue Code with respect to) that portion of the excessive profits for the renegotiated year which is equal to the amount of the gross renegotiation rebate. The amount by which the

gross renegotiation rebate for the renegotiated year exceeds the amount of the contractor's or subcontractor's Federal tax benefit from the renegotiation for such year shall be the amount of the net renegotiation rebate for such year.

(5) The term "subcontract" means—

(A) Any purchase order or agreement to perform all or any part of the work, or to make or furnish any article, required for the performance of any other contract or subcontract, but such term does not include any purchase order or agreement to furnish office supplies; or

(B) Any contract or arrangement other than a contract or arrangement between two contracting parties, one of which parties is found by the Board to be a bona fide executive officer, partner, or full-time employee of the other contracting party, (i) any amount payable under which is contingent upon the procurement of a contract or contracts with a Department or of a subcontract or subcontracts, or determined with reference to the amount of such a contract or subcontract or such contracts or subcontracts, or (ii) under which any part of the services performed or to be performed consists of the soliciting, attempting to procure, or procuring a contract or contracts with a Department or a subcontract or subcontracts: *Provided,* That nothing in this sentence shall be construed (1) to affect in any way the validity or construction of provisions in any contract with a Department or any subcontract, heretofore at any time or hereafter made, prohibiting the payment of contingent fees or commissions; or (2) to restrict in any way the authority of the Secretary or the Board to determine the nature or amount of selling expenses under subcontracts as defined in this subparagraph, as a proper element of the contract price or as a reimbursable item of cost, under a contract with a Department or a subcontract.

(6) The term "article" includes any material, part, assembly, machinery, equipment, or other personal property.

(7) The term "standard commercial article" means an article—

(A) which is identical in every material respect with an article which was manufactured and sold, and in general civilian, industrial, or commercial use prior to January 1, 1940,

(B) which is identical in every material respect with an article which is manufactured and sold, as a competitive product, by more than one manufacturer, or which is an article of the same kind and having the same use or uses as an article manufactured and sold, as a competitive product, by more than one manufacturer, and

(C) for which a maximum price has been established and is in effect under the Emergency Price Control Act of 1942, as amended, or under the Act of October 2, 1942, entitled "An Act to amend the Emergency Price Control Act of 1942, to aid in preventing inflation, and for other purposes", or which is sold at a price not in excess of the January 1, 1941, selling price.

An article made in whole or in part of substitute materials but otherwise identical in every material respect with the article with which it is compared under subparagraph (A) and (B) shall be considered as identical in every material respect with such article with which it is so compared.

(8) The term "fiscal year" means the taxable year of the contractor or subcontractor under Chapter 1 of the Internal Revenue Code.

(9) The terms "received or accrued" and "paid or incurred" shall be construed according to the method of accounting employed by the contractor or subcontractor in keeping his books.

Sec. 403(b). Subject to subsection (i), the Secretary of each department is authorized and directed to insert in each contract made by such Department thirty days or more after the date of the enactment of the Revenue Act

of 1943 and involving an estimated amount of more than $100,000, a provision under which the contractor agrees—

(1) to the elimination of excessive profits through renegotiation;

(2) that there may be retained by the United States from amounts otherwise due the contractor, or that he will repay to the United States, if paid to him, any excessive profits;

(3) that he will insert in each subcontract described in subsection (a) (5) (A) involving an estimated amount of more than $100,000, and in each subcontract described in subsection (a) (5) (B) involving an estimated amount of more than $25,000, a provision under which the subcontractor agrees—

(A) to the elimination of excessive profits through renegotiation;

(B) that there may be retained by the contractor for the United States from amounts otherwise due the subcontractor, or that the subcontractor will repay to the United States, if paid to him, any excessive profits;

(C) that the contractor shall be relieved of all liability to the subcontractor on account of any amount so retained, or so repaid by the subcontractor to the United States;

(D) that he will insert in each subcontract described in subsection (a) (5) (A) involving an estimated amount of more than $100,000, and in each subcontract described in subsection (a) (5) (B) involving an estimated amount of more than $25,000, provisions corresponding to those of subparagraphs (A), (B), and (C) and to those of this subparagraph;

(4) that there may be retained by the United States from amounts otherwise due the contractor, or that he will repay to the United States, as the Secretary may direct, any amounts which under paragraph (3) (B) the contractor is directed to withhold from a subcontractor and which are actually unpaid at the time the contractor receives such direction.

The obligations assumed by the contractor or subcontractor under paragraph (1) or (3) (A), as the case may be, agreeing to the elimination of excessive profits through renegotiation shall be binding on him only if the contract or subcontract, as the case may be, is subject to subsection (c). A provision inserted in a contract or subcontract, which recites in substance that the contract or subcontract shall be deemed to contain all the provisions required by this subsection shall be sufficient compliance with this subsection. Whether or not there is inserted in a contract with a Department or subcontract, to which subsection (c) is applicable, the provisions specified in this subsection, such contract or subcontract, as the case may be, shall be considered as having been made subject to such subsection in the same manner and to the same extent as if such provisions had been inserted.

Sec. 403(c). (1) Whenever, in the opinion of the Board, the amounts received or accrued under contracts with the Departments and subcontracts may reflect excessive profits, the Board shall give to the contractor or subcontractor, as the case may be, reasonable notice of the time and place of a conference to be held with respect thereto. The mailing of such notice by registered mail to the contractor or subcontractor shall constitute the commencement of the renegotiation proceeding. At the conference, which may be adjourned from time to time, the Board shall endeavor to make a final or other agreement with the contractor or subcontractor with respect to the elimination of excessive profits received or accrued, and with respect to such other matters relating thereto as the Board deems advisable. Any such agreement, if made, may, with the consent of the contractor or subcontractor, also include provisions with respect to the elimination of excessive profits likely to be received or accrued. If the Board does not make an agreement with respect to the elimination of excessive profits received or accrued, it shall issue and enter an order determining the amount, if any, of such excessive profits, and forthwith give notice thereof by registered mail to the contractor or subcontractor. In the absence of the filing of a petition with The Tax Court of the United States under the provisions

of and within the time limit prescribed in subsection (e) (1), such order shall be final and conclusive and shall not be subject to review or redetermination by any court or other agency. The Board shall exercise its powers with respect to the aggregate of the amounts received or accrued during the fiscal year (or such other period as may be fixed by mutual agreement) by a contractor or subcontractor under contracts with the Departments and subcontracts, and not separately with respect to amounts received or accrued under separate contracts with the Departments or subcontracts, except that the Board may exercise such powers separately with respect to amounts received or accrued by the contractor or subcontractor under any one or more separate contracts with the Departments or subcontracts at the request of the contractor or subcontractor. Whenever the Board makes a determination with respect to the amount of excessive profits, whether such determination is made by order or is embodied in an agreement with the contractor or subcontractor, it shall, at the request of the contractor or subcontractor, as the case may be, prepare and furnish such contractor or subcontractor with a statement of such determination, of the facts used as a basis therefor, and of its reasons for such determination. Such statement shall not be used in The Tax Court of the United States as proof of the facts or conclusions stated therein.

(2) Upon the making of an agreement, or the entry of an order, under paragraph (1) by the Board, or the entry of an order under subsection (e) by The Tax Court of the United States, determining excessive profits, the Board shall forthwith authorize and direct the Secretaries or any of them to eliminate such excessive profits (A) by reductions in the amounts otherwise payable to the contractor under contracts with the Departments, or by other revision of their terms; or (B) by withholding from amounts otherwise due to the contractor any amount of such excessive profits; or (C) by directing a contractor to withhold for the account of the United States, from amounts otherwise due to a subcontractor, any amount of such excessive profits of such subcontractor; or (D) by recovery from the contractor, through repayment, credit, or suit any amount

of such excessive profits actually paid to him; or (E) by any combination of these methods, as is deemed desirable. Actions on behalf of the United States may be brought in the appropriate courts of the United States to recover from the contractor any amount of such excessive profits actually paid to him and not withheld or eliminated by some other method under this subsection. The surety under a contract or subcontract shall not be liable for the repayment of any excessive profits thereon. Each contractor and subcontractor is hereby indemnified by the United States against all claims by any subcontractor on account of amounts withheld from such subcontractor pursuant to this paragraph. All money recovered in respect of amounts paid to the contractor from appropriations from the Treasury by way of repayment or suit under this subsection shall be covered into the Treasury as miscellaneous receipts. Upon the withholding of any amount of excessive profits or the crediting of any amount of excessive profits against amounts otherwise due a contractor, the Secretary shall certify the amount thereof to the Treasury and the appropriations of his Department shall be reduced by an amount equal to the amount so withheld or credited. The amount of such reductions shall be transferred to the surplus fund of the Treasury. In eliminating excessive profits the Secretary shall allow the contractor or subcontractor credit for Federal income and excess profits taxes as provided in section 3806 of the Internal Revenue Code. For the purposes of this paragraph the term "contractor" includes a subcontractor.

(3) No proceeding to determine the amount of excessive profits shall be commenced more than one year after the close of the fiscal year in which such excessive profits were received or accrued, or more than one year after the statement required under paragraph (5) is filed with the Board, whichever is the later, and if such proceeding is not so commenced, then upon the expiration of one year following the close of such fiscal year, or one year following the date upon which such statement is so filed, whichever is the later, all liabilities of the contractor or subcontractor for excessive profits received or accrued during such fiscal year shall

thereupon be discharged. If an agreement or order determining the amount of excessive profits is not made within one year following the commencement of the renegotiation proceeding, then upon the expiration of such one year all liabilities of the contractor or subcontractor for excessive profits with respect to which such proceeding was commenced shall thereupon be discharged, except that (A) if an order is made within such one year by the Secretary (or an officer or agency designated by the Secretary) pursuant to a delegation of authority under subsection (d)(4), such one-year limitation shall not apply to review of such order by the Board, and (B) such one-year period may be extended by mutual agreement.

(4) For the purposes of this section the Board may make final or other agreements with a contractor or subcontractor for the elimination of excessive profits and for the discharge of any liability for excessive profits under this section. Such agreements may contain such terms and conditions as the Board deems advisable. Any such agreement shall be conclusive according to its terms; and except upon a showing of fraud or malfeasance or a willful misrepresentation of a material fact, (A) such agreement shall not for the purpose of this section be reopened as to the matters agreed upon, and shall not be modified by any officer, employee, or agent of the United States, and (B) such agreement and any determination made in accordance therewith shall not be annulled, modified, set aside, or disregarded in any suit, action, or proceeding.

(5)(A) Every contractor and subcontractor who holds contracts or subcontracts, to which the provisions of this subsection are applicable, shall, in such form and detail as the Board may by regulations, prescribe, file with the Board on or before the first day of the fourth month following the close of the fiscal year (or if such fiscal year has closed on the date of the enactment of the Revenue Act of 1943, on or before the first day of the fourth month following the month in which such date of enactment falls), a financial statement setting forth such information as the Board may by regulations prescribe as necessary to carry

out this section.* In addition to the statement required under the preceding sentence, every such contractor or subcontractor shall, at such time or times and in such form and detail as the Board may by regulations prescribe, furnish the Board any information, records, or data which is determined by the Board to be necessary to carry out this section. Any person who willfully fails or refuses to furnish any statement, information, records, or data required of them under this subsection, or who knowingly furnishes any such statement, information, records, or data containing information which is false or misleading in any material respect shall, upon conviction thereof, be punished by a fine of not more than $10,000 or imprisonment for not more than two years, or both.

(B) For the purpose of this section the Board shall have the same powers with respect to any such contractor or subcontractor that any agency designated by the President to exercise the powers conferred by Title XIII of the Second War Powers Act, 1942, has with respect to any contractor to whom such title is applicable. In the interest of economy and the avoidance of duplication of inspection and audit, the services of the Bureau of Internal Revenue shall, upon request of the Board and the approval of the Secretary of the Treasury, be made available to the extent determined by the Secretary of the Treasury for the purpose of making examinations and audits under this section.

(6) This subsection shall be applicable to all contracts and subcontracts, to the extent of amounts received or accrued thereunder in any fiscal year ending after June 30, 1943, whether such contracts or subcontracts were made on, prior to, or after the date of the enactment of the Revenue Act of 1943, and whether or not such contracts or subcontracts contain the provisions required under subsection (b), unless (A) the contract or subcontract provides

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* Copies of the appropriate form may be obtained upon request to the War Contracts Price Adjustment Board, Assignments and Statistics Branch, Renegotiation Division, Room 3D573, The Pentagon, Washington 25, D. C.

otherwise pursuant to subsection (i), or is exempted under subsection (i), or (B) the aggregate of the amounts received or accrued in such fiscal year by the contractor or subcontractor and all persons under the control of or controlling or under common control with the contractor or subcontractor, under contracts with the Departments and subcontracts (including those described in clause (A), but excluding subcontracts described in subsection (a)(5)(B) do not exceed $500,000 and under subcontracts described in subsection (a)(5)(B) do not exceed $25,000 for such fiscal year. If such fiscal year is a fractional part of twelve months, the $500,000 amount and the $25,000 amount shall be reduced to the same fractional part thereof for the purposes of this paragraph.

Sec. 403(d). (1) There is hereby created a War Contracts Price Adjustment Board (in this section called the "Board"), which shall consist of six members. One of the members shall be an officer or employee of the Department of War and shall be appointed by the Secretary of War, one shall be an officer or employee of the Department of the Navy and shall be appointed by the Secretary of the Navy, one shall be an officer or employee of the Department of the Treasury and shall be appointed by the Secretary of the Treasury, one shall be an officer or employee of the United States Maritime Commission or the War Shipping Administration and shall be appointed jointly by the Chairman of the United States Maritime Commission and the Administrator of the War Shipping Administration, Chairman of the Board of Directors of the Reconstruction Finance Corporation and shall be appointed by the Chairman of the Board of directors of the Reconstruction Finance Corporation, and one shall be an officer or employee of the War Production Board and shall be appointed by the Chairman of the War Production Board. The members of the Board shall not receive additional compensation for service on the Board but shall be allowed and paid necessary travel and subsistence expenses (or a per diem in lieu thereof) while away from their official station on duties of the Board. They shall elect a chairman from among their members. The Board shall have a seal which shall be judicially noticed.

(2) The principal office of the Board shall be in the District of Columbia, but it or any division thereof may meet and exercise its powers at any other place within the United States. The Board may establish such number of field offices throughout the United States as it deems necessary to expedite the work of the Board. Four members of the Board shall constitute a quorum, and any power, function, or duty of the Board may be exercised or performed by a majority of the members present if the members present constitute at least a quorum.

(3) The Board is authorized, subject to the civil-service laws and the Classification Act of 1923, as amended, to employ and fix the compensation of such officers and employees as it deems necessary to assist it in carrying out its duties under this section. The Board may, with the consent of the head of the Department, agency, or instrumentality of the United States concerned, utilize the services of any officers or employees of the United States, and reimburse such Department, agency, or instrumentality for the services so utilized.

(4) The Board may delegate in whole or in part any power, function, or duty to the Secretary of a Department, and any power, function, or duty so delegated may be delegated in whole or in part by the Secretary to such officers or agencies of the United States as he may designate, and he may authorize successive redelegations of such powers, functions, and duties.

(5) The Chairman of the Board may from time to time divide the Board into divisions of one or more members, assign the members of the Board thereto, and in case of a division of more than one member, designate the chief thereof. The Board may also, by regulations or otherwise, determine the character of cases to be conducted initially by the Board through an officer or officers of, or utilized by, the Board, the character of cases to be conducted initially by the various officers and agencies authorized to exercise powers of the Board pursuant to paragraph (4), the character of cases to be conducted initially by the various divisions of the Board, and the character of cases

to be conducted initially by the Board itself. The Board may review any determination by any such officer, agency or division on its own motion, or in its discretion at the request of any contractor or subcontractor aggrieved thereby. Unless the Board upon its own motion initiates a review of such determination within 60 days from the date of such determination, or at the request of the contractor or subcontractor made within 60 days from the date of such determination initiates a review of such determination within 60 days from the date of such request, such determination shall be deemed the determination of the Board. Upon any review by the Board the Board may determine as the amount of excessive profits an amount either less than, equal to, or greater than that determined by the officer, agency, or division whose action is so reviewed.

Sec. 403(e). (1) Any contractor or subcontractor aggrieved by an order of the Board determining the amount of excessive profits received or accrued by such contractor or subcontractor may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the mailing of the notice of such order under subsection (c)(1), file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency. The court may determine as the amount of excessive profits an amount either less than, equal to, or greater than that determined by the Board. A proceeding before the Tax Court to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding de novo. For the purposes of this subsection the court shall have the same powers and duties, insofar as applicable, in respect of the contractor, the subcontractor, the Board and the Secretary, and in respect of the attendance of witnesses and the production of papers, notice of hearings, hearings

before divisions, review by the Tax Court of decisions of divisions, stenographic reporting, and reports of proceedings, as such court has under sections 1110, 1111, 1113, 1114, 1115(a), 1116, 1117(a), 1118, 1120, and 1121 of the Internal Revenue Code in the case of a proceeding to redetermine a deficiency. In the case of any witness for the Board or Secretary, the fees and mileage, and the expenses of taking any deposition shall be paid out of appropriations of the Board or Department available for that purpose, and in the case of any other witnesses, shall be paid, subject to rules prescribed by the court, by the party at whose instance the witness appears or the deposition is taken. The filing of a petition under this subsection shall not operate to stay the execution of the order of the Board under subsection (c)(2).

(2) Any contractor or subcontractor (excluding a subcontractor described in subsection (a) (5) (B)) aggrieved by a determination of the Secretary made prior to the date of the enactment of the Revenue Act of 1943, with respect to a fiscal year ending before July 1, 1943, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of the enactment of the Revenue Act of 1943, file a petition with The Tax Court of the United States for a redetermination thereof, and any such contractor or subcontractor aggrieved by a determination of the Secretary made on or after the date of the enactment of the Revenue Act of 1943, with respect to any such fiscal year, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of such determination, file a petition with The Tax Court of the United States for redetermination thereof. Upon such filings such court shall have the same jurisdiction, powers, and duties, and the proceeding shall be subject to the same provisions, as in the case of a petition filed with the court under paragraph (1), except that the amendments made to this section by the

Revenue Act of 1943 which are not made applicable as of April 28, 1942, or to fiscal years ending before July 1, 1943, shall not apply.

Sec. 403(f). For repricing of war contracts, see Title VIII of the Revenue Act of 1943.

Sec. 403(g). If any provision of this section or the application thereof to any person or circumstance is held invalid, the remainder of the section and the application of such provision to other persons or circumstances shall not be affected thereby.

Sec. 403(h). This section shall apply only with respect to profits derived from contracts with the Departments and subcontracts which are attributable to performance prior to the termination date. For the purposes of this subsection—

(1) The profits derived from any contract with a Department or subcontract which shall be deemed "attributable to performance prior to the termination date" shall be—

(A) in the case of any contract or subcontract the performance of which requires more than twelve months, or in the case of any contract or subcontract with respect to which the powers of the Board are exercised separately pursuant to subsection (c) (1) rather than on a fiscal-year basis, the portion of the profits so derived which is determined by the Board to be equal to the same percentage of the total profits so derived as the percentage of completion of the contract prior to the termination date; and

(B) in all other cases, the profits so derived which are received or accrued prior to the termination date; and

(2) The term "termination date" means—

(A) December 31, 1944; or

(B) If the President not later than December 1, 1944, finds and by proclamation declares that competitive conditions have not been restored, such date not

later than June 30, 1945, as may be specified by the President in such proclamation as the termination date; or

(C) If the President, not later than June 30, 1945, finds and by proclamation declares that competitive conditions have been restored as of any date within six months prior to the issuance of such proclamation, the date as of which the President in such proclamation declares that competitive conditions have been restored;

except that in no event shall the termination date extend beyond the date proclaimed by the President as the date of the termination of hostilities in the present war, or the date specified in a concurrent resolution of the two Houses of Congress as the date of such termination, whichever is the earlier.

Sec. 403(i). (1) The provisions of this section shall not apply to——

(A) Any contract by a Department with any other department, bureau, agency, or governmental corporation of the United States or with any Territory, possession, or State or any agency thereof or with any foreign government or any agency thereof; or

(B) any contract or subcontract for the product of a mine, oil or gas well, or other mineral or natural deposit, or timber, which has not been processed, refined, or treated beyond the first form or state suitable for industrial use; or

(C) any contract or subcontract for an agricultural commodity in its raw or natural state, or if the commodity is not customarily sold or has not an established market in its raw or natural state, in the first form or state, beyond the raw or natural state, in which it is customarily sold or in which it has an established market. The term "agricultural commodity" as used herein shall include but shall not be limited to—

(i) commodities resulting from the cultivation of the soil such as grains of all kinds, fruits, nuts, vege-

tables, hay, straw, cotton, tobacco, sugar cane, and sugar beets;

(ii) natural resins, saps and gums of trees;

(iii) animals such as cattle, hogs, poultry, and sheep, fish and other marine life, and the produce of live animals, such as wool, eggs, milk and cream; or

(D) any contract or subcontract with an organization exempt from taxation under section 101 (6) of the Internal Revenue Code; or

(E) any contract with a Department, awarded as a result of competitive bidding, for the construction of any building, structure, improvement, or facility; or

(F) any subcontract, directly or indirectly under a contract or subcontract to which this section does not apply by reason of this paragraph.

(2) The Board is authorized by regulation to interpret and apply the exemptions provided for in paragraph (1) (A), (B), (C), (E), and (F), and interpret and apply the definition contained in subsection (a) (7).

(3) In the case of a contractor or subcontractor who produces or acquires the product of a mine, oil or gas well, or other mineral or natural deposit, or timber, and processes, refines, or treats such a product to and beyond the first form or state suitable for industrial use, or who produces or acquires an agricultural product and processes, refines, or treats such a product to and beyond the first form or state in which it is customarily sold or in which it has an established market, the Board shall prescribe such regulations as may be necessary to give such contractor or subcontractor a cost allowance substantially equivalent to the amount which would have been realized by such contractor or subcontractor if he had sold such product at such first form or state. Notwithstanding any other provisions of this section there shall be excluded from consideration in determining whether or not a contractor or subcontractor has received or accrued excessive profits that portion of the profits, derived from contracts with the Departments

and subcontracts, attributable to the increment in value of the excess inventory. For the purposes of this paragraph the term "excess inventory" means inventory of products, hereinbefore described in this paragraph, acquired by the contractor or subcontractor in the form or at the state in which contracts for such products on hand or on contract would be exempted from this section by subsection (i) (1) (B) or (C), which is in excess of the inventory reasonably necessary to fulfill existing contracts or orders. That portion of the profits, derived from contracts with the Departments and subcontracts, attributable to the increment in value of the excess inventory, and the method of excluding such portion of profits from consideration in determining whether or not the contractor or subcontractor has received or accrued excessive profits, shall be determined in accordance with regulations prescribed by the Board. In the case of a renegotiation with respect to a fiscal year ending prior to July 1, 1943, the portion of the profits, derived from contracts with the Departments and subcontracts, attributable to the increment in value of the excess inventory shall (to the extent such portion does not exceed the excessive profits determined), be credited or refunded to the contractor or subcontractor, and in case the determination of excessive profits was made prior to the date of the enactment of the Revenue Act of 1943, such credit or refund shall be made notwithstanding such determination is embodied in an agreement with the contractor or subcontractor, but in either case such credit or refund shall be made only if the contractor or subcontractor, within ninety days after the date of the enactment of the Revenue Act of 1943, files a claim therefor with the Secretary concerned.

(4) The Board is authorized, in its discretion, to exempt from some or all of the provisions of this section—

(A) any contract or subcontract to be performed outside of the territorial limits of the continental United States or in Alaska;

(B) any contracts or subcontracts under which, in the opinion of the Board, the profits can be determined with reasonable certainty when the contract price is established,

such as certain classes of agreements for personal services, for the purchase of real property, perishable goods, or commodities the minimum price for the sale of which has been fixed by a public regulatory body, of leases and license agreements, and of agreements where the period of performance under such contract or subcontract will not be in excess of thirty days;

(C) any contract or subcontract or performance thereunder during a specified period or periods, if in the opinion of the Board, the provisions of the contract are otherwise adequate to prevent excessive profits;

(D) any contract or subcontract for the making or furnishing of a standard commercial article, if, in the opinion of the Board, competitive conditions affecting the sale of such article are such as will reasonably protect the Government against excessive prices;

(E) any contract or subcontract, if, in the opinion of the Board, competitive conditions affecting the making of such contract or subcontract are such as are likely to result in effective competition with respect to the contract or subcontract price; and

(F) any subcontract or group of subcontracts not otherwise exempt from the provisions of this section, if in the opinion of the Board, it is not administratively feasible in the case of such subcontract or in the case of such group of subcontracts to determine and segregate the profits attributable to such subcontract or group of subcontracts from the profits attributable to activities not subject to renegotiation. The Board may so exempt contracts and subcontracts both individually and by general classes or types.

Sec. 403 (j). Nothing in sections 109 and 113 of the Criminal Code (U. S. C., title 18, secs. 198 and 203) or in section 190 of the Revised Statutes (U. S. C., title 5, sec. 99) shall be deemed to prevent any person by reason of service in a Department or the Board during the period (or a part thereof) beginning May 27, 1940, and ending six months after the termination of hostilities in the present war, as proclaimed by the President, from acting as counsel, agent,

or attorney for prosecuting any claim against the United States: *Provided,* That such person shall not prosecute any claim against the United States (1) involving any subject matter directly connected with which such person was so employed, or (2) during the period such person is engaged in employment in a Department.

Sec. 403 (k). Nothing in this section shall be construed to limit or restrict any authority or discretion of the Secretary of a Department under the provisions of any other law.

Sec. 403 (l). This section may be cited as the "Renegotiation Act."

Effective date of Section 403. Section 701 (d) of the Revenue Act of 1943 provides:

> "The amendments made by subsection (b) shall be effective only with respect to the fiscal years ending after June 30, 1943, except that (1) the amendments inserting subsections (a) (4) (C), (a) (4) (D), (i) (1) (C), (i) (1) (D), (i) (1) (F), (i) (3), and (1) in section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, shall be effective as if such amendments and subsections had been a part of Section 403 of such Act on the date of its enactment, and (2) the amendments adding subsection (d) and (e) (2) to section 403 of such Act shall be effective from the date of the enactment of this Act."

AIRCRAFT & DIESEL EQUIPMENT CORPORATION, a Corporation,

vs.

MAURICE HIRSCH, et al.

Civil Action No. 28999

Note: Exhibit "C" attached here, is the same as the Opinion, at page 628 of this transcript.

EXHIBIT "C"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Filed Sept. 28, 1945. Chas. E. Stewart, Clerk

Civil Action No. 28999

AIRCRAFT & DIESEL EQUIPMENT CORPORATION, a Corporation, *Plaintiff*,

v.

MAURICE HIRSCH, W. JOHN KENNY, JOHN R. PAUL, H. C. MAULL, JR., GLADDING B. COIT, CARMAN B. BLOUGH, HENRY L. STIMSON, Secretary of War; ROBERT P. PATTERSON, Under Secretary of War, *Defendants*

Before Miller, Associate Justice, United States Court of Appeals, District of Columbia, and Bailey and Proctor, Associate Justices, District Court of the United States for the District of Columbia, Sitting as a Statutory Three-judge Court

BAILEY, *J.*:

The plaintiff is a corporation under the laws of the State of Delaware. The defendant Henry L. Stimson was the Secretary of War and the defendant Robert P. Patterson was the Under Secretary of War at the time of the filing of the amended complaint. The remaining defendants are the members of The War Contracts Price Adjustment Board.

This is a suit filed by the plaintiff, seeking a declaratory judgment to the effect that the original Renegotiation Act passed by Congress on April 28, 1942 and the later Act which became effective on February 25, 1944, being Title VII of the Revenue Act of 1943 which amended and re-enacted the Act of April 28, 1942, is each unconstitutional as repugnant to Articles I and II and Amendments V, VII and X of the Constitution of the United States.

The plaintiff has filed an amended and supplemental complaint in which it also seeks injunctive relief restraining the

defendants from further proceeding under the Renegotiation Act and particularly under Sections 403(c)(2) and 403-(e)-(1) in so far as said Act and said sections provide for the taking of plaintiff's "property" without any form of judicial review, and, in addition, injunctive relief restraining the defendants from taking plaintiff's "property" prior to a redetermination by The Tax Court of the United States of the determination of the War Contracts Price Adjustment Board, for the reason that said order was entered by the Board illegally, arbitrarily, capriciously and without regard to the evidence then before it, finally, that the enforcement of said order of January 11, 1945 will cause plaintiff irreparable injury, and this latter relief is sought also under the general equity powers of the Court.

The amended complaint states that the plaintiff made a contract with the United States Navy on May 21, 1941, under which it agreed to furnish certain pumps to the United States Navy; that on March 17, 1942 it entered into an agreement supplemental to contract of May 21, 1941, by which plaintiff agreed to furnish certain pumps and other material to the United States Navy, and that during the fiscal year ended November 30, 1943, it furnished to the Navy Department pumps and other material as had not been previously furnished on the supplemental contract of March 27, 1942, and that all the equipment delivered by the plaintiff to the United States Navy in the fiscal year ended November 30, 1943 were all paid for by the United States on or before the 27th day of August 1943; that after certain proceedings and conferences the War Contracts Price Adjustment Board notified plaintiff that it had received excessive profits of $1,265,000 in the fiscal year ended November 30, 1943 and that on or about January 11, 1945 plaintiff was notified of the entrance and issuance of an order by the defendant, Robert P. Patterson, Under Secretary of War, acting as a delegate of the War Contracts Price Adjustment Board that plaintiff had realized the said excessive profits in the said fiscal year and plaintiff was directed to pay that sum, less applicable taxes previously paid, to the Treasury of the United States; that on February 28, 1945 plaintiff requested the said Board to initiate a review of the above

determination but that on May 3, 1945 the Board refused to do so; that under the provisions of Section 403(c)(2) of the Renegotiation Act the Board may direct the defendant Henry L. Stimson, Secretary of War, to direct contractors or sub-contractors for whom the plaintiff had done work under contract or pursuant to sales orders, to withhold such sums of money due the plaintiff as will aggregate $1,265,000 less applicable tax adjustment; that on April 4, 1945 plaintiff, pursuant to right granted by Section 403-(e)(1) of the Renegotiation Act, petitioned the Tax Court of the United States to redetermine the excessive profits, if any, realized during the fiscal year ended November 30, 1943; that the United States filed a motion to strike this petition on the ground that it was filed prematurely; that this motion was heard on May 16, 1945 but that in the event The Tax Court shall dismiss said petition, the plaintiff will file another petition in The Tax Court for the same purpose; that "notwithstanding the fact that the plaintiff has filed its petition for redetermination in the Tax Court of the United States whereby it seeks an orderly determination of the amount, if any, it may owe to the United States of America, as excessive profits for its fiscal year ending November 30, 1943," the War Contracts Price Adjustment Board purposes to direct the Secretary of War to withhold moneys due to the plaintiff by said contracts for the account of the United States in the amounts determined by it to be due as excessive profits and the Secretary of War purposes to follow such directions; that in the event of such seizure of such amounts due to the plaintiff or the payment thereof by customers thereof to the Treasury, the amounts so seized or paid would be transferred to the Surplus Fund of the United States Treasury; that the Renegotiation Act in so far as it may authorize such seizure is in violation of rights guaranteed to the plaintiff by the Constitution of the United States; that "there was, as of May 1, 1945, due plaintiff from its customers (they being firms, individuals and corporations, other than the United States of America, or any department, agency or instrumentality thereof) approximately $274,000, and on that date plaintiff had on its books unfilled orders from such customers and others (not the

United States of America or any department, agency or instrumentality thereof), calling for the manufacture and sale of its products at prices approximately aggregating $890,000. The said sums now due, or such portion thereof as the War Contracts Price Adjustment Board has determined should be withheld and paid into the Treasury, and other sums which may become due in the future, Henry L. Stimson or his delegates will, as his delegate Robert P. Patterson did in a prior year, direct to be withheld from the plaintiff and paid into the Treasury of the United States. Plaintiff avers that, after adjustment for Federal income and excess profits taxes, the amount involved in the order and decision of War Contracts Price Adjustment Board does not and can not exceed $275,000, but defendant Henry L. Stimson, acting at the threatened direction of the War Contracts Price Adjustment Board nevertheless threatens to, and will, unless enjoined and restrained, order the withholding from the plaintiff and the payment by plaintiff's customers of said sums of money into the Treasury of the United States;" that the action of the War Contracts Price Adjustment Board was arbitrary; it refused to state the ground upon which it acted and this was in violation of the provisions of the Constitution in that it acted without due process of law.

The amended complaint further sets out certain transactions which it claims were contracts entered into before the passage of the original Renegotiation Act under which various articles were sold, some of which were sold and delivered after the passage of that Act and some before, and that the action of the defendants in making any redetermination of all profits arising under these contracts was unconstitutional and void; that as to contracts entered into after the passage of the Renegotiation Act, in so far as they might be controlled by the Act, the Act was so indefinite and uncertain and was unconstitutional in investing administrative bodies with the legislative powers without sufficiently defining the terms and conditions under which these powers were to be exercised.

The amended complaint seeks an injunction enjoining the defendants from eliminating any excessive profits of the

plaintiff determined by the War Contracts Price Adjustment Board by directing any customers of the plaintiff to withhold for the account of the United States, or otherwise, any moneys due to the plaintiff or directing any such customers to pay any money due to the plaintiff into the Treasury of the United States.

The preliminary question to be determined is the jurisdiction of equity. In the first place the plaintiff has filed its petition in The Tax Court of the United States, seeking a determination of the amount of excess profits, if any, which it has earned if the Renegotiation Act be constitutional. It is enough to say that if The Tax Court of the United States should hold that the plaintiff received no excess profits, then the constitutionality of the Act of Congress is immaterial so far as the rights of the plaintiff are concerned and for that reason the suit is premature.

In addition to this, equity has no jurisdiction for the reason that the plaintiff has complete remedies by actions at law. It claims that certain parties are indebted to it by reason of certain contracts; the payment of these claims under a judgment at law would give a full, adequate and complete remedy. These debtors are not numerous, and so far as the plaintiff's being entitled to relief to avoid a multiplicity of suits, it has a complete remedy in the Court of Claims for all sums of which it may be deprived, if the Renegotiation Act be unconstitutional.

In the case of *Coffman* v. *Breeze Corporations, Inc., et al.*, 323 U. S. 316, which was a suit by a patent owner against his licensees, seeking an adjudication of unconstitutionality of the Royalty Adjustment Act and seeking an injunction against the licensees from complying with the Act by paying the balance in excess of royalty payments and in excess of the amount declared by the War and Navy Departments to be fair and just into the Treasury of the United States, the Court held that equity was without jurisdiction. The Act in question in that case deprived the licensor of any remedy. The Court said:

> "The only rights asserted as the basis for the relief sought by appellant are derived from the license agreements. These agreements, so far as now appears and

as we assume for present purposes, are contractual obligations to pay the stipulated royalties. As they accrue, the royalties become simple debts recoverable in an action at law, or possibly, where the accounts are complicated, in a proceeding for an accounting such as appellant has already begun in its separate suit pending in the District Court of New Jersey. *Kirby* v. *Lake Shore & M. S. R. Co.*, 120 U. S. 130; *United States* v. *Old Settlers*, 148 U. S. 427, 465.

"Appellant does not in the present suit bring to our attention any facts showing or tending to show that a suit to recover a money judgment for the royalties would not afford complete and adequate relief without resort to an equitable remedy. In such a suit if appellee Breeze is obligated by the contracts in question to pay the royalties to appellant, it can discharge that obligation only by payment of the amount due, or by setting up the Royalty Adjustment Act as a defense. Compliance with the duty under the Act to pay into the Treasury the royalties withheld from appellant would operate by the terms of the Act as a discharge of the obligation to pay appellant. If that defense were offered, the constitutional validity of these provisions of the Act would be a justiciable issue in the case, since upon its adjudication would depend appellant's right to recovery.

"But whether the provisions of the Act be valid or invalid appellant shows no ground for equitable relief. If valid they would be a defense, and appellant would be entitled to no relief other than that afforded by the suit against the Government authorized by § 2 of the Act. If invalid, appellant's right to recover remains unimpaired. The sufficiency of the defense may be as readily tested in a suit at law to recover the royalties as by the present suit in equity to enjoin payment of the royalties into the Treasury. In either case appellant would receive all the relief to which it shows itself entitled."

The Act of Congress involved in the *Coffman case* is very similar to the Act in this case and there is no reason why

the plaintiff has not a complete and adequate remedy by suit against its customers for any sums that may be due from them, if the Act be unconstitutional; and, as to any liability on the part of the United States, its remedy is in the Court of Claims.

The plaintiff contends that the *Coffman case* was decided simply upon the ground that the complaint did not allege that the plaintiff in that case would be irreparably injured. It is not sufficient, however, to allege irreparable injury without showing the facts upon which that injury follows. In this case, mere delay in the collection of sums due to the plaintiff, the complaint not stating that the debtors are or are likely to become insolvent, does not constitute irreparable injury.

So far as the administrative procedure is concerned, any defects in the hearing before the War Contracts Price Adjustment Board are immaterial so long as the plaintiff obtains a full hearing before The Tax Court of the United States. *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333.

In the case of *Arrow Distilleries, Inc.* v. *Alexander*, 24 Fed. Supp. 880, which was affirmed by the Supreme Court of the United States in 306 U. S. 615, it was held that one is not entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted, even though the question of the constitutionality of the statute prescribing the administrative remedy is undecided.

We conclude, therefore, that the suit is premature and, in addition, that equity has no jurisdiction.

The motions of the defendants to dismiss the amended complaint and for a summary judgment will each be sustained without prejudice, however, to the right of the plaintiff to maintain actions at law against its debtors and to bring suit as it may be advised in the Court of Claims.

(S.) JUSTICE MILLER.
(S.) JENNINGS BAILEY.
(S.) JAMES M. PROCTOR.